

JUDICIAL DISCIPLINE in Colorado

Interim Committee on Judicial Discipline Presentation

June 14, 2022

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Merit Selection




Colorado's Judicial Merit Selection System:

**50 years of choosing
judges based on merit.
Not money. Not politics.**


In 1966, Colorado voters approved a merit selection system for judicial appointments. This citizen-involved process helps ensure that Colorado judges are highly-qualified, fair, and impartial. It is the gold standard that safeguards equal treatment for all Coloradans coming into court.

How does it work?





Effective judicial discipline is an important part of a trusted and trustworthy court system. The public must know that judicial ethics and violations of the Code of Judicial Conduct are taken seriously. Absent that assurance, the system appears self-serving, protectionist, and even potentially corrupt. And it is not just the reality of the existence of effective systems that matters; it is also the appearance. A wholly effective system with no transparency and no public confidence will not suffice.



RECOMMENDATIONS FOR JUDICIAL DISCIPLINE SYSTEMS



PREFACE

Until the 1960s, the formal methods for addressing allegations of state judges' misconduct, such as legislative impeachment or recall elections, were cumbersome and time-consuming. These shortcomings were highlighted when scandals rocked several state judiciaries,¹ revealing a need for more efficient disciplinary procedures. Starting in 1960, California and eventually all states established variously named bodies (this Report uses the generic term "commission") to investigate allegations of judicial misconduct or disability and—where appropriate—prosecute, adjudicate, and either recommend discipline to the state's highest court or impose it, subject to appellate review.²

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another, although it offers some generalizations based in part on a May 2018 IAALS staff review of commission websites. Cynthia Gray, who directs the National Center for State Courts Center for Judicial Ethics, has highlighted some principal variations in her work.³ And the Center publishes quarterly its very helpful *Judicial Conduct Reporter*, with summaries of commission activities and decisions, among other publications.⁴

Finally, we recognize that many of the practices that we endorse in this Report are already in place in many or even most states. In short, the system is already doing a good job in many areas. We also recognize that commission structure, jurisdiction, and operations may be beyond a commission's authority to change, based as they are in constitutions, statutes, and court rules. In this Report, we seek to identify some better practices that commissions, state supreme courts, and legislatures can review and identify as doable and advisable—or not. We also seek to identify concrete ways to improve the trustworthiness of the judiciary. This Report is a companion document to IAALS' report on its 2017 Judicial Recusal Convening,⁵ and both reports seek to identify concrete ways to improve public confidence in the judiciary.

1 See, e.g., Note, *Court Scandal in Oklahoma Supreme Court*, 20 OKLA. L. REV. 417 (1967); Kenneth Manaster, *Illinois Justice, The Scandal of 1969 and the Rise of John Paul Stevens* (U. Chi. Press, 2001).

2 National Center for State Courts, *State Court Organization*, §1.9, *Judicial Discipline: Investigating and Adjudicating Bodies*, available at <http://www.ncsc.org/microsites/sco/home/List-Of-Tables.aspx>.

3 Keith Swisher, *Judicial Discipline in the States*, IAALS *Judicial Discipline Pre-Convening Whitepaper* (2018).

4 See, e.g., Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007).

5 National Center for State Courts, *State Court Organization, Judicial Conduct Reporter*, available at <http://www.ncsc.org/Topics/Judicial-Officers-Ethics/Center-for-Judicial-Ethics/Judicial-Conduct-Reporter.aspx>; see also National Center for State Courts, *State Court Organization, Center for Judicial Ethics Publications*, available at <http://www.ncsc.org/topics/judicial-officers-ethics/center-for-judicial-ethics/cje-publications.aspx>.

6 See Russell Wheeler & Malia Reddick, *Judicial Recusal Procedures, A Report on the IAALS Convening* (June 2017).

Importance of Credible Ethics Oversight

The primary purpose of [judicial discipline] systems is not to punish judges but to maintain and restore public confidence in the integrity, independence, and impartiality of judges and the judicial system ...

*Handbook for Members of Judicial Conduct Commissions
(NCSC Center for Judicial Ethics)*

Judicial
Discipline is
the Only Non-
Political
Mechanism for
Addressing
Judicial
Misconduct

Judicial
Discipline

Recall

Impeachment

Contested
Retention
Elections

Unlike other paths to judicial removal, judicial discipline is confidential pending the announcement of public sanctions.

Oversight Entities

Discipline



Commission

Performance



Commissions

Nominating



Commissions

Commission on
Judicial
Discipline
Created in Art.
VI, Sec. 23(3)

4 Judicial
Members

2 Attorney
Members

4 Citizen
Members

Appointed
by Supreme
Court

Appointed by Gov / Sen

Serving a maximum of two terms of four years each

Judicial Members

Hon. Rachel Fresquez

Hon. Sara Garrido

Hon. Bonnie McLean

Hon. David Prince

Attorney Members

Elizabeth Espinosa Krupa

Mindy Sooter

Citizen Members

Jim Carpenter

Bruce A. Casias

Yolonda Lyons

Drucilla Pugh

Diversity of Commission

- **70% Female**
- **75% of Judges Female**
- **50% BIPOC**
- **20% White Male**

Race / Ethnicity	CO Population	% of Judges	# of Judges
American Indian / Alaska Native	1.6%	0.3%	1
Asian	3.5%	1.8%	6
Black / African American	4.6%	3.0%	10
Hispanic / Latino	21.8%	9.5%	32
White, not Hispanic or Latino	67.7%	84.6%	286
Two or More Races - Not Hispanic or Latino	3.1%	0.9%	3
			100.0%
			338

Race / Ethnicity	CO Population	% of Judges	# of Judges
Female	49.9%	40.8%	138
Male	50.1%	59.2%	200
			338

SCAO Judicial Diversity Outreach

COJD Staffing

- Executive Director
- Administrative Assistant, Attorney and Investigator pursuit

Discipline Commission's Constitutional Mandate

- **Protect the public from improper conduct of judges**
- **Preserve the integrity of the judicial process**
- **Maintain public confidence in the judiciary**
- **Create a greater awareness of proper judicial behavior**
- **Provide for the fair and expeditious disposition of complaints of judicial misconduct/disabilities**



Screening

Investigation

Formal
Proceedings

Recommendation

Final



Intake and Screening

- Governed by RJD 13
- Exec Dir or
Commission may
immediately dismiss
if no reasonable
basis



Complaint Investigation

- Analogous to Grand Jury Role
- Governed by RJD 14
- Develop Factual Evidence
- May Use Investigators and Special Counsel
- Advances only if preponderance of evidence std. met



Formal Proceedings

- Trial Phase
- Special Counsel
“prosecutes”
- Hearing conducted either by Commission itself or through special masters
- Standard of proof is clear and convincing



Recommendations

- Commission prepares and transmits recommendations to Supreme Court for discipline along with record of proceedings.
- Special Counsel may also make recommendations
- If used, special master recommendations included
- Proceedings confidential until recommendations filed



Supreme Ct Proceedings

- SC may conduct further proceedings and expand record, RJD 39
- SC may adopt, reject, modify, or remand Commission recommendations
- SC makes final decision, RJD 40
- Decision published unless decide to keep confidential

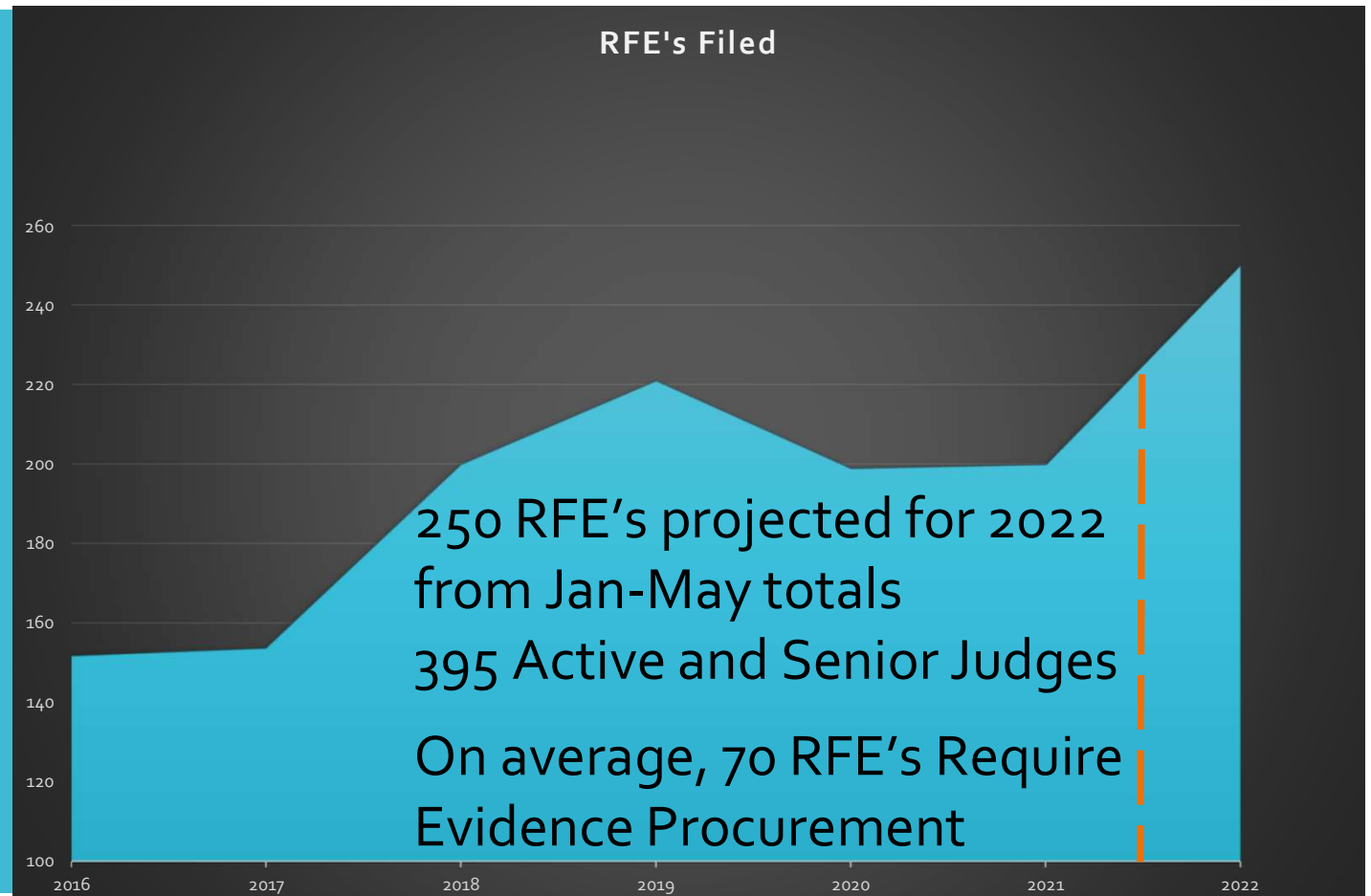
Sanction Authority, RJD 35 & 36

- Supreme Court (Public)
 - Removal
 - Retirement
 - Suspension
 - Disability
 - Public Reprimand or Censure
 - Diversion or Deferred
- Commission (Private)
 - Dismissal
 - Disability
 - Diversion Plan
 - Private Admonishment
 - Private Reprimand
 - Private Censure
 - Stipulation

Confidentiality

- Confidentiality is set by the Constitution, Art. VI, Sec. 23(3)(g)
- The Disciplinary Commission's examination of misconduct allegations is confidential unless and until it files recommendations with the Colorado Supreme Court.
- While individual investigations are confidential, the Disciplinary Commission can discuss how it operates and how its processes are working. See, e.g., RJD 6.5(h)
- RJD 6.5(d)(i) authorizes the Commission to make disclosures as needed to fulfill the Commission's mandate.

Annual RFE Volume



Public Discipline Cases

Public Discipline Cases					
Judges Disciplined (6) ¹			Known Individual Recipients of Misconduct (14) ²		
	Number	Percent	Number	Percent	
Male	3	50%	1	7%	
Female	3	50%	13	93%	
White	5	83%	11 (3)	78%	
BIPOC	1 (4)	7%	3	12%	
¹ 2014 to Present					
² Litigants, attorneys, other groups affected cannot be quantified and are excluded, only a person that was the individual target of the misconduct is included.					
³ Listed as white if race/ethnicity not known.					
⁴ Discipline process was after Judge had already resigned facing criminal proceedings.					

Types of Conduct Resulting in Public Discipline

- Behavior Abusive of Others, Usually Discriminatory—four cases
- Criminal Proceedings/Convictions—three cases
 - Felony is mandatory removal, RJD 36.5
- Multiple Incidents—all but one case
 - Aggravating components in single incident case

Can't risk angering him, clients in precarious positions
Uncomfortable appearing in front of him

Terrified
Afraid would get fired if told administration about this

Judge might retaliate and felt job was on the line
Threatened

Felt angry
Wanted to get out of the division
Tears
Appalled

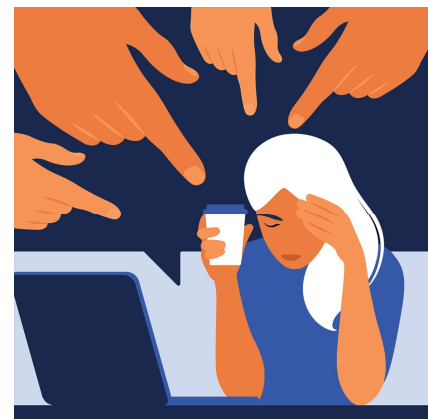
Did not want to report to administration

Afraid of retaliation
Sweating, nervous, terrified, wanted to get out

Made [me] feel nauseated and scared
Scared to death might get fired, then angry

Not want to tell anyone just wait for a transfer

Shocked
A stab through my heart each time
Uncomfortable
Had to put up with it, could not hurt my clients



While Colorado's challenges are unique, they are not unusual nor are they as serious as other jurisdictions

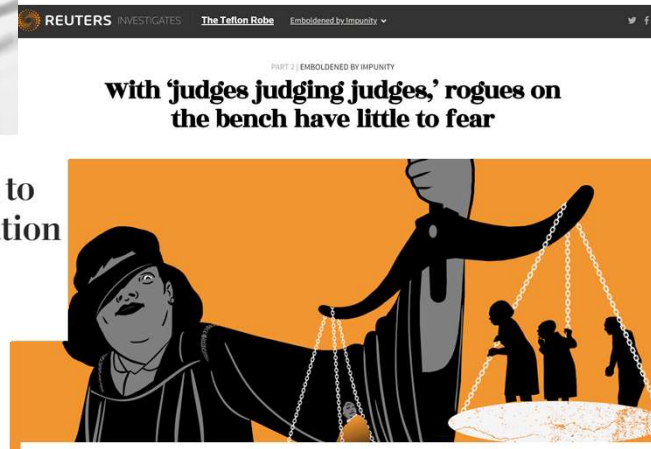


Courts & Law

Former judiciary workers urge Congress to protect court employees from discrimination and harassment

By Ann E. Marimow

March 17, 2022 at 5:44 p.m. EDT



Secretive and cozy judicial oversight systems enable judges to subvert accountability in many states. Exhibit A: Oklahoma, where not a single judge was publicly disciplined in 14 years. When the state finally did charge a judge with wrongdoing, he was allowed to resign, his record pristine and his pension intact.

By [MICHAEL BERENS](#) and [JOHN SHIFFMAN](#) in BARTLESVILLE, OKLAHOMA | Filed July 9, 2020, 10 a.m. GMT

District Court Judge Curtis DeLapp was renowned for his hair-trigger temper. Mispronounce his name, come to court a few seconds late, fail to rise as quickly as he'd like – no slight was too small to set him off.

For almost a dozen years, DeLapp used his power to terrify people who appeared

Impediments and Recommendations

*under current structure

Intake and Screening Phase



- 2010 Disclosure and File Access Agreement
 - Compliance and Enforcement Issues
- SB 22-201 Codified Duty to Document and Disclose
- No Enforcement Mechanism Yet
 - Examples
 - Need conflict free mechanism

Complaint Investigation Phase



- Resourcing Investigations
 - Conflicted Funding and Loaned Personnel
 - SB 22-201 Addressed Funding and Personnel
- Access to Information
 - SB 22-201 Duty to Document and Disclose
 - Subpoena Authority (Rule 22)
 - Need to be Codified, Confirm at All Phases
 - Need Conflict Free Dispute Resolution Mechanism (See Rules 4(e), 18.5(b))

Formal Proceedings Phase



- Rulemaking
 - Challenges experienced
 - Place with Discipline Commission, Public Process
 - Colorado Performance Commissions hold this authority, C.R.S. 13-5.5-106
 - 20 other states assign to discipline commission
- Decision-Maker Disqualification Standards
 - Who are Decision Makers in Judicial Discipline?
 - Current rules patchwork of ambiguity, inconsistency, and uncertainty
 - Recommend Codify simple, straightforward and uniform disqualification standard, Code Rule 2.11
 - Legislative authority to do so

Formal Proceedings Phase



- Special Masters
 - Ad hoc selection and appointment now
 - Recommend establishing a pool of potential masters
 - Gain subject matter expertise
 - Gain institutional knowledge with standards
 - Insulate process from influence
- Commission Member Terms
 - Four-year terms now
 - Longer terms provide greater subject matter expertise and institutional experience
 - Longer terms insulate from influence
 - District Court Judge term is four years, Appellate Court Judge Term is ten years

Final Decision Phase



- Final Decision-Maker Conflicts
 - Decisional Conflicts, Code Rules 2.9, 2.11
 - Administrative/Corporate Role Conflicts, Rules 2.9, 2.11
- Model Options
 - Illinois, standing conflict free, multi-perspective final decision-making entity
 - Pennsylvania, pro tem supreme court
 - New York variation, recommendation of Commission is final unless overturned by quorum of conflict free members of highest court

Overall

- Transparency
 - Initial evaluations and dismissals confidential in nearly every state (Arizona has unique approach)
 - Dividing line is whether full confidentiality ends before or after the “trial” (formal proceedings)
 - Recall, trial can only occur after charges already established by preponderance of evidence
 - 35 states make fact-finding hearing public
 - 15 states keep fact-finding hearing confidential
 - Colorado is one of the 15 states
 - Many policy pros and cons as to any line for confidentiality



Questions??

References

- ABA Model Rules of Judicial Disciplinary Enforcement, www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement/contents/
- Handbook for Members of Judicial Conduct Commissions, NCSC Center for Judicial Ethics
- Reuters, Teflon Robe Series, www.reuters.com/investigates/section/usa-judges/
- www.washingtonpost.com/politics/2022/03/17/court-workers-harassment-discrimination/
- IAALS Judicial Discipline Recommendations, [18-IAALS-104 Judicial Discipline Report R2.indd \(du.edu\)](http://18-IAALS-104.Judicial%20Discipline%20Report%20R2.indd%20(du.edu))
- NCSC Center for Judicial Ethics report of confidentiality standards, [Confidentiality table.pdf \(ncsc.org\)](http://Confidentiality_table.pdf(ncsc.org))